Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

J & E SALVAGE COMPANY, JOHN DARLINGTON and THERESA N. DARLINGTON, Executrix of the Estate of EDWARD DARLINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not the decision of the United States Court of Appeals for the Federal Circuit that petitioner failed to state a claim upon which relief could be granted growing out of the taking by the federal government of helicopter transmissions having a value of $1,150,600 under color of an order rendered by a Federal District Court lacking subject matter jurisdiction involves an important question of federal law that has not been but should be settled by the United States Supreme Court.

2. Whether or not the decision of the United States Court of Appeals for the Federal Circuit is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949).

3. Whether or not the United States Court of Appeals for the Federal Circuit failed to properly construe 40 U.S.C. § 484(d).

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 Petitioners, John Darlington, and Teresa N. Darlington, Executrix of the Estate of Edward Darlington, are general partners in J & E Salvage Company. J & E Salvage Company, located in Jacksonville, North Carolina, has no parents or subsidiaries (other than those that are wholly owned).

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Petitioners, J & E Salvage, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced in the appendix filed herein at 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on March 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

40 U.S.C. § 484(d) provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this sub chapter shall be conclusive evidence of compliance with provisions of this sub chapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

STATEMENT OF THE CASE

Petitioners John Darlington and Theresa Darlington, executrix of the Estate of Edward Darlington, are general partners in J & E Salvage Company (hereinafter referred to as J & E), located in Jacksonville, North Carolina. On May 19, 1992, John and Edward Darlington attended an auction held by the Defense Reutilization and Marketing Office (hereinafter referred to as DRMO) at Cherry Point, North Carolina for the sale of certain surplus materials discarded by the United States Department of Defense. At the sale, J & E purchased Lot Numbers 42 through 47, which appeared to be large containers used for shipping and storing helicopter transmissions. Since the containers were bolted shut at the time of the sale and J & E was not allowed to inspect the contents of the containers, they were unable to determine what, if anything, was inside the containers. The lots were described in the Invitation for Bids and the Notice of Award as "Shipping and Storage container: 2 EA." It is important to note that the containers were not described as "Containers (empty)" which is frequently the manner in which DRMO describes empty containers. It is not unusual in the government surplus trade to learn that merchandise described as "containers" turns out to be containers with other property in them. J & E paid a total of $1,075 for the "lots" of property.

After paying for the merchandise, J & E transferred the property back to its place of business. Sometime thereafter, the containers were opened and it was discovered that four of them contained surplus helicopter transmissions which were valued at $289,600 each. As was the custom in the trade when undescribed merchandise was discovered in a lot bought from the government, J & E called DRMO and told it that J & E had the transmissions. DRMO demanded that J & E return the transmissions. Standing upon the custom in the trade regarding

the buying of government merchandise, J & E refused to return the transmissions, claiming that they were the property of J & E.

Several months later, the United States of America filed suit against J & E in the United States District Court, Eastern District of North Carolina, seeking the return of the transmissions and asking for damages. In due course, J & E responded that the District Court lacked subject matter jurisdiction, arguing that the dispute was governed by the Contract Disputes Act, 41 U.S.C. §§ 601-613. The District Court held that it had jurisdiction and ordered J & E to return the transmissions to the government. *United States v. J & E Salvage Co.*, No. 92-162-CIV-4-H (E.D.N.C. August 19, 1994). J & E complied with the order of the District Court and returned the transmissions on September 9, 1994. J & E then appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit, which reversed the District Court on the question of subject matter jurisdiction and remanded with instructions to grant J & E's motion to dismiss. *United States v. J & E Salvage Co.*, 55 F.3d 985, 990 (4th Cir. 1995).

On August 3, 1995, J & E sent a letter to G. Norman Acker, III, an Assistant United States Attorney for the Eastern District of North Carolina, demanding that the government return the transmissions in light of the Fourth Circuit's decision. Mr. Acker referred J & E's letter to counsel for DRMO. On September 5, 1995 in a document titled "Finding of Fact and Final Decision," Dan Hurston, a contracting officer with DRMO, denied J & E's request for return of the transmissions. In so doing, Mr. Hurston stated that "legal title of the CH-46 transmissions did not transfer to J & E Salvage as a result of the sale of the shipping and storage containers."

J & E then filed suit in the United States Court of Federal Claims seeking compensation for the transmissions on the ground that the taking of the transmissions under color of an order issued by a federal court which lacked subject matter jurisdiction and the subsequent refusal of the United States to return the transmissions on demand amounted to a Fifth Amendment taking. The Court of Federal Claims granted the government's motion to dismiss for failure to state a claim upon which relief could be granted, saying that: (1) contractually-based property rights generally do not give rise to taking claims; (2) in the Cherry Point auction, the government was acting in its propriety capacity rather than in its sovereign capacity; and (3) the purchase contract had not been fully performed and therefore ownership of the transmissions had not vested in J & E. *J & E Salvage Co. v. United States*, 36 Fed. Cl. 192, 196 (1996). J & E subsequently amended its complaint to allege breach of contract, which was also dismissed for failure to state a claim upon which relief can be granted. *J & E. Salvage Co. v. United States*, 37 Fed. Cl. 256 (1997).

On appeal to the United States Court of Appeals for the Federal Circuit, on the taking issue, the Federal Circuit affirmed the decision of the Court of Federal Claims, but used a different rationale for affirming the decision of the Court of Federal Claims than that court had used in issuing its ruling. The Federal Circuit based its decision on the premise that "J & E never acquired a compensable property interest in the helicopter transmissions because the transmissions were never part of the subject matter of the contract." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 5a.

Petitioners argued that under 40 U.S.C. § 484(d) when a purchaser buys government surplus, insofar as his title is concerned, everything required to be done by government agents in selling the merchandise is deemed to have been done,

regardless of whether it was actually done or not. Petitioners pointed out that this clear reading of 40 U.S.C. § 484(d) had most recently been held to be the proper one by the District Court of the District of Columbia in *Pacific Harbor Capitol v. Dept. of Agric.*, 845 F. Supp. 1 (D.D.C. 1993). J & E showed that the DRMO manual provided for several procedures to be performed which ensured that property was not mistakenly included in containers which were to be sold. Therefore, since it is conclusively presumed pursuant to 40 U.S.C. § 484(d) that these procedures were performed, there could have been no mistake or inadvertence in including the transmissions in the containers. Moreover, since the DRMO manual required that an accurate description of the property be made, under 40 U.S.C. § 484(d) the only choice for the court was to conclude, for the purposes of whether or not petitioners had title to the transmissions, was that describing the property as "shipping containers" was the proper way to describe containers with transmissions in them.

The Federal Circuit never directly addressed this argument. Rather than dealing with the argument, the court simply said:

> In this case, the helicopter transmissions were never part of the sales contract and thus §484(d) is inapplicable. It is clear from the plain language of §484(d) that the conclusive presumption regarding title only applies to the property which the instrument purports to transfer. Here the contract documents only purported to transfer an interest in the storage containers. *J & E Salvage Co. v. United States*, No. 97-5066 App. at 8a.

In support of petitioners' reading of 40 U.S.C. § 484(d), they showed the Federal Circuit that it has long been the law that 40 U.S.C. § 484(d) prevents the government from

challenging the sale of surplus goods based on claims of lack of authority or mistake, citing *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). The Federal Circuit attempted to distinguish *Jones* by saying that the government had contracted to sell universal gear joints in that case; overlooking the fact that in *Jones* the government thought it was selling automotive universal gear joints which had a minimal value (the amount paid was computed to be $69.13), when in fact it was selling marine universal gear joints having a retail value of $62,533.45. *Jones*, 176 F.2d at 283. The Federal Circuit held that the holding in *Jones* did not apply to this case because, "The conclusive presumption regarding title only applies to the property which the instrument purports to transfer." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 8a.

Furthermore, the petitioners showed that in a case involving facts virtually identical to those in this case, the Armed Services Board of Contract Appeals refused to allow the government to reclaim infrared missile heads that had been sold in lots described as: "Containers, Shipping: Drums, various sizes." *Appeal of John T. Gonsalves*, ASBCA No. 31874 (Mar. 10, 1986). In that case the board stated:

> Doubtless the Navy knew the missile heads and parts were within the drums, whether or not the Navy conveyed this information to the DPDS (Defense Property Disposal Service). Repeatedly respondent requests that we strictly construe the provisions of their surplus sales contracts. Respondent cannot now ask us to set aside a final sale to correct a mistake it made.

The Court of Appeals said that it did not find the reasoning of the Armed Services Board of Contract Appeals to be persuasive. The Court said that the Board "failed to analyze the fundamental

question of whether the missile heads were within the scope of the contract." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 10a.

J & E further argued that under the "GENERAL SALE TERMS AND CONDITIONS" part of the contract, under the heading "CONDITION AND LOCATION OF PROPERTY," that the government said:

> Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose.

The Federal Circuit, without discussion, pronounced that the government's warranty disclaimer did not help J & E:

> The disclaimer simply precluded the purchaser from alleging a breach of contract if the goods failed to accurately match their description. This provision did not preclude the government from recovering possession of merchandise inadvertently contained within the goods actually sold. *J & E Salvage Co. v. United States*, No 97-5066 App. at 6a.

The court did not cite any evidence in the record that the transmissions were in the containers through "inadvertence." The record is totally devoid of any such evidence.

REASONS FOR GRANTING THE WRIT

Given the vast quantity of property which is utilized and subsequently discarded by the government of the United States, Congress made the decision to include 40 U.S.C. § 484(d) in the Federal Property Administrative Services Act of 1949 (hereinafter referred to as FPASA) as it had included a virtually identical provision in the Surplus Property Act of 1944 (hereinafter referred to as SPA).[1] 40 U.S.C. § 484(d) reads:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this sub chapter shall be conclusive evidence of compliance with the provisions of this sub chapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

The seminal case interpreting § 25 of the SPA (and thus 40 U.S.C. § 484(d)) is *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). In *Jones*, the purchaser paid $69.13 for universal gear joints which had a value in excess of $60,000. The government agents who sold the property had been unaware that the gear joints were maritime equipment, mistaking them for automotive equipment. Given the inequitable difference between the price paid and the actual value of the property, and

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1. Whereas § 25 of the Surplus Property Act protected title to "property" sold under the act as opposed to "surplus property" in the FPASA, it had been held that the addition of the word "surplus" was not intended in any way to limit the scope of the protection of the purchaser's title. *Pacific Harbor Capitol v. Dept. of Agric., supra* 845 F. Supp. at 5. The government offered no evidence that the transmissions in question here were not in fact surplus property.

the mistake of the government as to what it had sold, the court held that a recission of the transaction would be called for in an ordinary commercial transaction. *Jones*, 176 F.2d at 288. Nevertheless, the Ninth Circuit held that § 25 of the SPA, "has made the sale to Jones immune against an attack based on lack of authority or mistake." *Id.* The government did not seek review of the decision in *Jones* in this court, and its broad holding has governed the field of surplus sales for the past half century.

For example, in *Pacific Harbor Capitol v. Dept. of Agric.*, *supra*, which was not discussed by the Federal Circuit, the Forest Service obtained historic airplanes from the Department of Defense for the purpose of trading them for non-historic airplanes owned by a company called TMB Inc. *Pacific Harbor Capitol*, 845 F. Supp. at 2. The Forest Service's trading of the planes was in violation of the applicable regulations because it was plainly illegal for them to trade historic airplanes for non-historic airplanes and, furthermore, it was not legal for them to obtain planes from the Department of Defense for the purpose of exchanging them, or to dispose of them in any event without using them for one year. *id* Moreover, the planes had never been determined to be "surplus," as required by 40 U.S.C. § 472. *id.* at 2-3.

In *Pacific Harbor*, the court held that the bills of sale on which the plaintiff relied were conclusive evidence, as it concerned plaintiff's, title that the General Services Administration declared the property surplus in compliance with the FPASA, even if the General Services Administration had not done so. *id* at 4. Similarly, the bills of sale were conclusive evidence, insofar as plaintiff's title was concerned, that the defendants had complied with all the provisions and regulations under sub chapter 2 of the FPASA regarding the transfer of government property, including the regulations regarding historic exchanges that the forest service had clearly violated. *id* at 2.

Thus, we have two holdings, one by the Ninth Circuit, for which the government did not seek review in this court, and another by the District Court of the District of Columbia which the United States did not appeal, in which courts held that in the area of marketing surplus the government will not be heard to say that it made a mistake in selling property which it sold, even where the facts clearly showed that it had made a mistake. The Eastern District of Tennessee held similarly in *East Tennessee Iron and Metal Co. v. United States*, 218 F. Supp. 377 (1963), which the government did not appeal, as did the United States Court of Claims in *Turney v. United States*, 115 F. Supp. 457 (Cl. Ct. 1953), which was also not appealed. The decision of the Armed Services Board of Contract Appeals in *Appeal of John T. Gonsalves*, *supra*, while not explicitly mentioning 40 U.S.C. § 484(d), reflects the principle that the government will not be heard to say that it made a mistake in selling surplus property. Petitioners submit that this principle has become so embedded in the law of government surplus that the Board of Contract Appeals did not believe it to be necessary to provide an analysis of the source of the rule. Moreover, the government did not appeal the ruling in *Gonsalves*.

The plain language of 40 U.S.C. § 484(d) supports petitioners' claim to title of the transmissions. It is undisputed that petitioners have a "Notice of Award" for lot numbers 42 through 47 of the property sold at the Cherry Point, North Carolina auction held on May 19, 1992. The Notice of Award was executed on behalf of the Department of Defense, an executive agency. Thus it constitutes conclusive evidence, *i.e.* an irrebuttable presumption, that the provisions of Sub Chapter II of Chapter 10 of Title 40 of the United States code were complied with. The DRMO manual is a compilation of regulations promulgated by the Department of Defense pursuant to Sub Chapter I, of Chapter 10 of Title 40 of the United States

Code. See DRMO Manual II. A. 1. If the provisions of the DRMO manual are complied with it is impossible for material to be sold "inadvertently" or through mistake. If 40 U.S.C. § 484(d) has any meaning at all, it clearly means that this court must conclude that everything that the manual says must be done, was done in the case of the property purchased by petitioners on May 21, 1992. Thus, when the containers were received by DRMO they were inspected upon receipt and the property description was verified. DRMO Manual VI. G. 2. b. Under that same provision, if a discrepancy existed, the discrepancy was sent to the Generating Activity within five working days from receipt of the property and the discrepancy was resolved. Had the discrepancy not been resolved within a reasonable time, the shipment would have been returned. Furthermore, if the containers had been thought to be empty rather than containing transmissions, there would have been a signed certificate, certifying the containers to be empty as required by DRMO Manual VII. D. 22. g.[2]

In addition, as petitioners have pointed out *supra* at p. 7, under the General Sales Terms and Conditions, petitioners bought the property here "as is/where is." As petitioners pointed out by affidavit in the courts below, "as is/where is" is the watch word of the condition and description of property in government surplus sales. The government makes "no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or *description* of any of the property, or its fitness for any use or purpose." General Sales Terms and Conditions paragraph 2 (emphasis added). The Federal Circuit said that this provision innured solely to the benefit of the government and in no way protected the purchaser. In other words "heads, we win and tails, you lose." But, such a position is clearly

2. As petitioners showed in the court below, DRMO frequently describes empty containers as "CONTAINERS (empty)." when it wishes to indicate that it is selling empty containers.

unjust and inequitable. For example, had the purchasers discovered transmissions which were worthless in the containers, and did not wish to undertake the task of disposing of over a ton of valueless material, they could not have taken the transmissions back to DRMO for DRMO to deal with the problem, DRMO would have said "You bought them 'as is where is' We did not guarantee that the containers were empty."

Furthermore, as the situation now stands under the Federal Circuit's ruling, every purchaser of government surplus who finds material not described among his property is faced with a difficult problem. Must he take the undescribed material back to DRMO at his expense, or risk administrative and legal proceedings for retention of property which the government says still belongs to it. Does DRMO have the option of saying that it wants the property back if the property is desirable or, on the other hand, saying that getting rid of the property is the purchaser's problem if the property is undesirable. Under the Federal Circuit's holding the terms of the sale are "as is/where is if the government wishes it to be so". Just as 40 U.S.C. § 484(d) in effect now reads, in pertinent part, "in surplus property *particularly described by the bill of sale.*"

In addition to the foregoing analysis which supports petitioners' position in this case, there is a very practical scenario for explaining why the property bought by the petitioners was described in the manner that it was described and no inspection of the insides of the containers was permitted prior to the sale. At the time that the transmissions which petitioners bought went out of service in the mid 1980s, it was contemplated that the CH-46 helicopter which used the transmissions would be replaced by the V22-Osprey by 1990. Had the Osprey not had the problems which prevented it from coming into service, the transmissions here would have been valueless by the time they were sold. Thus, it would not have been unreasonable to assume

that empty containers would have been more valuable and desirable than containers which held useless and very heavy transmissions which would have required some kind of disposal. In the courts below, petitioners introduced a copy of an article from Aviation Week and Space Technology dated February 9, 1990, documenting the problems with the V22-Osprey and the consequent plans to refurbish the CH-46. This possibility was never discussed by either court and petitioners were not allowed to conduct any discovery whatsoever on this theory.

More than thirty-five years ago, the Second Circuit said of government surplus sales:

> By way of preliminary it is to be noted that this is no ordinary contract between buyer and seller for the purchase and sale of a valuable commodity. When the government sells surplus goods it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may under the circumstances be possible, to minimize its loss. Sales of this character are processed on a mass quantity basis by members of the armed forces who seldom if ever have any expertise in the particular items which come to their warehouses and depots. Buyers of such surplus property know perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall of profit. *Dardourian Export Corp. v. United States*, 291 F.2d 178, 182 (2nd Cir. 1961).

Thus, if petitioners seek a windfall in this case, it is a bargained-for windfall. The possibility of obtaining a windfall is one of the long recognized attractions of buying at surplus auctions.

But, if this Court does not correct the situation as it exists in this case, it will countenance the actions of the government in flouting the provisions of the Contract Disputes Act, seizing the property of the petitioners under color of a void order issued by a court without jurisdiction, and refusing to restore the status quo after the lawlessness of its action had been declared. If the decision of the Court of Appeals for the Federal Circuit is allowed to stand, the government will be allowed to assert in any case that it chooses that the property it sold was sold "inadvertently" or by mistake, and title to that property will never be secure, because no limitation is contained in the statute. *See United States v. Jones*, *supra*, 176 F.2d at 289. Thus, the desirability of government surplus property and its value will be diminished. The intent of Congress "to provide for the government an economical and efficient system for. . . . (c) the disposal of surplus property . . ." will be thwarted. 40 U.S.C. § 471. Furthermore, the petitioners will have been cheated out of $1,158,400 in violation of the Fifth Amendment.

This is surely a case where the Federal Circuit has entered a decision in conflict with the decisions of the Ninth Circuit Court of Appeals in *United States v. Jones*, *supra*. It is also the case where the Federal Circuit has decided an important question of Federal law that has not been, but should be decided by this court. Petitioner prays that this court will issue its writ of certiorari to the United States Court of Appeals for the Federal Circuit to review its decision in the case below.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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